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# Supreme Court of the United States

OCTOBER TERM, 1965

No. 699

WILLIAM EDGAR JOHN, JR.,

Appellant,

*against*

ELIZABETH BOWMAN JOHN,

Appellee.

## APPELLANT'S REPLY BRIEF

WARNER PYNE,
Counsel for Appellant.

MONROE J. CAHN,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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The grounds of appellee's motion to dismiss or affirm are two (p. 1):

1. That the appeal is not authorized because the validity of a state statute was not drawn in question on the ground of repugnancy to the Constitution, with the decision in favor of validity; and

2. That the appeal does not present a substantial federal question.

### I

Appellee's argument that the appeal is not authorized ignores the facts and misconceives the law.

Neither the vacatur order nor the petition upon which it was based (Jur. St. pp. 23-25), set forth the statutory ground, if any, whether Court Rule or otherwise, upon

which they were made, as appellee admits (p. 4); accordingly, in his assertion of federal invalidity appellant could not attack any specific statute or rule, and grounded his application in all-inclusive terms, which encompassed every possible ground, statute or rule upon which the appellee might seek to sustain the vacatur (Jur. St. pp. 6-7). The Special Term sustained appellant's attack upon the ground that the Florida Court did not have "jurisdiction to vacate its own decree *ex parte*" (Jur. St. pp. 15, 17). The Appellate Division affirmed without opinion. The first Court to hold that the vacatur order was authorized by the Florida Rules was the Court of Appeals. Then for the first time Florida Rules 1.4 and 1.38 were interpreted as dispensing with the necessity for notice to appellant, and were resorted to and applied as an answer to the claim of lack of constitutional procedural due process (Jur. St. pp. 18-20, 22). The Court of Appeals has certified that the federal constitutional question was duly raised and considered (Jur. St. pp. 7-8).

This Court's jurisdiction of the appeal is sustained by the authorities heretofore cited by us (Jur. St. p. 1) and further by *Charleston Ass'n* v. *Alderson,* 324 U. S. 182, 185:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction of the appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. Manhatan Life Ins. Co. v. Cohen, 234 U. S. 123, 134; Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 551; Saltonsall v. Saltonsall, 276 U. S. 260, 267; Home Ins. Co. v. Dick, 281 U. S. 397, 407; Nickey v. Mississippi, 292 U. S. 393, 394; Whitfield v. Ohio, 297 U. S. 431, 435-6."

Appellee asserts (p. 4) that appellant has made his own selection of the Florida statutes claimed to be repugnant to the Fourteenth Amendment. This is incorrect. At appellee's instance the Court of Appeals selected Florida Rules 1.4 and 1.38 as sufficient to avoid the constitutional requirement of due process (Jur. St. pp. 18-19, 22). We added Florida Rule 3.16 as also being "involved in this case" (Jur. St. p. 4) in obedience to Rule 15 (1) (c) (1) of the Rules of this Court that "(o)nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court" (cf., *Flournoy* v. *Wiener*, 321 U. S. 253, 263) and also, if needed, for its bearing on consideration of certiorari under U.S.C. § 1257(c).

## II

Appellee's contention (p. 5) that a substantial federal question is not presented is supported by the citation of no authority. It requires no argument that the absence of procedural due process presents a fundamental federal question under the Fourteenth Amendment; and that such question, if present, is substantial unless it has been authoritatively ruled upon. Since appellant is unable to cite any case where such ruling has been made the substantiality of the question is self-evident.

Appellee claims (p. 6) that *Griffin* v. *Griffin*, 327 U. S. 220 and *Wetmore* v. *Carrick*, 205 U. S. 141, are not applicable because in both of those cases the aggrieved party had at one time appeared in the action, appellee's implication being that such prior appearance was the basis of this Court's ruling. The implication is disproved by those decisions. In neither case was the right to notice of the *ex parte* action under review grounded upon such prior appearance; the ground of decision in both was that the rights affected were of such substantial character that they could not be adjudicated without notice to the party acted against, with opportunity to be heard in opposition. So at

bar appellant's right to notice is based upon the *ex parte* deprivation and destruction of the substantial rights of status and property which for 45 days had vested in him by virtue of and under the vacated judgment of divorce.

Appellee's contention (p. 7) that the vacatur order rests upon non-federal grounds requires little notice. Whether the New York Court of Appeals correctly interpreted the Florida Rules is not in issue, though it is of passing interest that neither the New York Court nor appellee has cited a single Florida case to support the interpretation and application of such Rules claimed by them, and there are Florida cases to the contrary (Jur. St. p. 11).

The question in issue on this appeal is: assuming that the New York Court correctly interpreted the Florida Rules, is the application of such Rules so interpreted to validate the vacatur order repugnant to the Fourteenth Amendment? That this question is incontestably for this Court is not doubtful (e.g., *Ballard* v. *Hunter*, 204 U. S. 241; *Young* v. *Ragen*, 337 U. S. 235, 238).

## III

Appellee frankly admits (p. 5):

> "both the appellant and the appellee would be merely guessing as to what statute was involved in the Florida Court's action."

This is a confession that appellee is unable to point to any Florida authority that justified the vacatur under Florida law, warranting the conclusion that since the vacatur cannot be sustained under Florida law it is not entitled to credit in New York (Jur. St. p. 10, ¶2). Moreover, appellee makes no attempt to support the holding of the New York Court of Appeals by the citation of any federal or other authority. Nor does appellee attempt to dispute that rights of status and property vested in ap-

pellant by virtue of the decree of divorce (Jur. St. p. 9). Under these circumstances, we believe that the error in the ruling of the Court of Appeals is so clear that argument of the appeal is unnecessary and that the judgment of the Court of Appeals may properly be reversed on the papers submitted; and the order of the Appellate Division affirmed, with costs.

If such summary disposition is not made, it is respectfully asked that jurisdiction of the appeal be noted, that the case be added to the summary calendar and that the argument be set for an early date. The reason for early consideration is that under the remand of the Court of Appeals the Special Term has made an award against appellant of temporary alimony amounting to over $14,000 to be paid immediately, with additional future payments of $175 weekly, and, in addition, of counsel fees of $5,000, of which $2,500 is directed to be paid at once, which allowances will fall if this Court reverses the judgment of the Court of Appeals.

Respectfully submitted,

WARNER PYNE,
Counsel for Appellant.

MONROE J. CAHN,
of Counsel.

END